No. 11,496

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY CAVASSA,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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RESTATEMENT OF QUESTIONS INVOLVED.

The appellant argued three major propositions in his opening brief, in support of his contention that the judgment of the lower Court should be reversed. The first two propositions are:

I. The Court erred in holding the retail sales made by appellant were in interstate commerce.

II. The Court erred in construing the Federal Food, Drug and Cosmetic Act, and particularly Section 331 (k) of Title 21 of the United States Code as applying to the acts of appellant, because such acts were in intrastate commerce and not in interstate commerce.

The appellee, in its brief (Appellee's Brief, p. 8), concedes that the acts of the appellant herein occurred at a time when the drugs in question were in intrastate commerce, while held for sale and that the acts of sale constituted intrastate commerce.

The first two points presented by appellant are grounded on the theory that Section 331 (k) *can* have reference only to acts done in connection with articles in interstate commerce. The intent and purpose of a section of an act does not determine its constitutionality.

The appellee contends that it is immaterial whether the articles of drug involved herein were in interstate commerce or intrastate commerce. This contention is not acceded to by the appellant. Appellant considers it to be of great and vital importance in this matter.

The appellee centers its argument around the third proposition raised in appellant's brief, namely:

> III. The Court erred in holding that the Federal Food, Drug and Cosmetic Act, and particularly Section 331 (k) of Title 21 of the United States code so construed as applying to the intrastate acts of appellant was valid and constitutional and not in violation of the Tenth Amendment to Article I, Section 8, Paragraph 3 of the Constitution of the United States of America.

ARGUMENT.

The Federal Government is a government of delegated powers. Article I, Section 8, Paragraph 3 of the Constitution of the United States gives Congress the power

> "to regulate commerce with foreign nations and among the several states."

This is the foundation stone upon which the Federal Food, Drug and Cosmetic Act is laid, and it is by this section, and the decisions construing it, that the act, and particularly Section 331 (k), as applied in this case, must be judged.

There are perhaps many phases of our modern life which would be better regulated by a central government than by various local governments. But when the government of the United States was established, a dual system was decided upon, and it is under such a system that we live. The mere fact that Congress believes that the sale of drugs should be regulated by the Federal government does not in and of itself make such a regulation constitutional. The validity or invalidity of an act, or a subsection thereof, is to be tested by the decisions of the Courts and the precedents set down therein.

The framers of the Constitution, in drawing up the Commerce Clause, used words without any veiled or obscure signification. In *Gibbons v. Ogden* (9 Wheat. 1, 188, 6 L. Ed. 23, 68):

> "As men whose intentions require no concealment generally employ the words which most directly

> and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said."

Those who framed the Constitution had no intention of subjecting thousands of small local enterprises to national direction. If the possibility of this had been declared, the Constitution could not have been adopted. So construed, the power to regulate interstate commerce brings within the ambit of federal control most, if not all, activities of the nation, subjects states to the will of Congress, and permits disruption of our federated system.

Kidd v. Pearson (1888), 128 U. S. 1, 20, 21, 32 L. Ed. 346, 350, 9 S. Ct. 6, lucidly pointed out the necessary result of this subversive doctrine, showed how it had long been authoritatively rejected, and demonstrated its utter absurdity. The doctrine approved in the *Pearson* case has been often applied, see *United States v. C. E. Knight Co.* (1895), 156 U. S. 1, 16, 39 L. Ed. 325, 330, 15 S. Ct. 249; *Oliver Iron Min. Co. v. Lord* (1923), 262 U. S. 172, 178, 67 L. Ed. 929, 935, 43 S. Ct. 526; *A. L. A. Schechter Poultry Corp. v. United States* (1935), 295 U. S. 495, 545-55, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; *Carter v. Carter Coal Co.* (1936), 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

These cases illustrate the basic quality of the point herein involved. The attempted curtailment of the

independence reserved to the states, and the tremendous enlargement of federal power denote the serious impairment of the very foundation of our federated system.

I.

IT IS TRUE THAT THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE EXTENDS TO ACTS WHICH DIRECTLY AFFECT SUCH COMMERCE, BUT APPELLANT CONTENDS THAT HIS ACTS HAVE NO SUCH EFFECT, DIRECT OR INDIRECT, AND THE FEDERAL FOOD, DRUG AND COSMETIC ACT AND PARTICULARLY SECTION 331(k) OF TITLE 21 OF THE UNITED STATES CODE, MAKES NO REFERENCE TO SUCH ACTS.

The Federal Food, Drug and Cosmetic Act (Public Law, No. 717, Seventy-fifth Congress, Chapter 675, Third Session, S. 5) sets forth, that it is,

> "An act to *prohibit the movement in interstate commerce* of adulterated and misbranded foods, drugs, devices and cosmetics and for other purposes".

21 U.S.C.A. Section 331 (k) prohibits,

> "The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded".

Nowhere in these provisions is there mention of the control of acts which might "directly affect" interstate commerce. If Congress intended the act to be

so applied, why did it not resolve all possible doubts by the insertion of two simple words? In the absence of such declaration by Congress, the conclusion is inescapable that Congress had no intention that the Federal Food, Drug and Cosmetic Act should be so applied.

Assuming for the sake of argument that, regardless of the expression by Congress in the Act itself, the implied power to control acts, which "directly affect" interstate commerce, exists. We are then faced with the problem of deciding whether the acts of appellant so affect said commerce.

It is important to clearly visualize the status of the appellant; this man whose acts, according to the appellee have a "direct affect" upon interstate commerce. He is not a manufacturer whose products are shipped in interstate commerce, he is not a seller of goods to be shipped in interstate commerce, he is not even an original consignee of goods shipped in interstate commerce. He is a retail druggist who purchases small lots of drugs and other items from wholesale houses within the City and County of San Francisco, and resells these items to purchasers who come into his store off the street. If this, appellant's acts, have any effect, direct or indirect on interstate commerce, then there is no activity which the Federal Government could not reach under the guise of this power. The thought of appellant's acts affecting interstate commerce is one which at first glance is filled with humor were its implications not fraught with such grave danger to the very foundation of our

system of government. If appellant's acts in this case can be regulated by the Federal Government, then there is no activity which could not be so regulated merely because at sometime in the course of manufacture, production, shipment or sale, interstate commerce was involved. As a result, Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?

The Court in the case of *A. L. A. Schechter Poultry Corp. v. United States* (1935), 295 U. S. 495, 546, 548-550, 79 L. ed. 1570, 1588-1591, 55 S. Ct. 837, 97 A. L. R. 947, said:

> "* * * If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufference of the federal government * * * The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. * * * If the federal government may determine the wages and hours of employees in the internal commerce of a State * * * it would seem that a similar control might be exerted over other elements of cost, also affect-

> ing prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. * * * But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. * * *"

The appellee in its brief attempts to distinguish the *Schechter* case from the facts of the case at issue, (Appellee's Brief, p. 20), on the ground that the provisions of the Code in the *Schechter* case were chiefly directed at the control of the details of the defendant's management of their intrastate business. It is difficult to see how the control of the sale of drugs by a druggist can be any less a control of the details of intrastate business than the control attempted over the wages and hours of employees in the *Schechter* case. Both appellant and the defendant in the *Schechter* case are retailers of items, that at one time in the course of their existence, were in interstate commerce, and in neither case can any direct effect on interstate commerce be discerned.

In the case of *National Labor Relations Board v. Jones & Laughlin S. Corp.,* 301 U. S. 1, 81 L. ed. 893, the Court said:

> "The scope of the power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effect-

> ually obliterate the distinction between what is national and what is local and create a completely centralized government."

It is difficult to perceive wherein the alleged "direct effect" on interstate commerce is present in the wholly intrastate acts of the appellant in this case, and it is submitted that there is no basis in law or reason for applying different rules to the *Schechter* case and the case at issue.

II.

IT IS FOR THE COURTS TO DETERMINE WHETHER CONGRESS HAS ACTED WITHIN THE POWERS GRANTED IT IN THE CONSTITUTION OR HAS OVERREACHED THOSE POWERS.

The Legislative history of an act of Congress is helpful in determining the intent of Congress in passing the legislation in question, but the expression of various committees is not a determination of the constitutionality of Section 331 (k). Whatever its desires or beliefs, Congress must act within its granted powers, or have the Constitution properly amended so as to allow the passage of legislation it deems advisable. The Constitution should not be amended by legislative fiat, and such is the fact if the appellee's contention is followed.

III.

CONGRESSIONAL CONTROL OVER INTRASTATE ACTIVITIES THAT AFFECT INTERSTATE COMMERCE DOES NOT EXTEND TO APPELLANT'S ACTS IN THIS CASE SINCE HIS ACTS CAN, BY NO REASONABLE STRETCH OF THE IMAGINATION, AFFECT INTERSTATE COMMERCE IN THE MANNER INTENDED BY THE COURTS IN THE USE OF THE PHRASE.

As was said by the Court in *United States v. E. C. Knight Co.,* 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 S. Ct. 247:

> "Slight reflection will show that if the national power extends to all productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

In *U. S. v. Darby,* 312 U. S. 100, the Court, in its decision, said:

> "But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a *substantial* effect on interstate commerce. * * * A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. * * * But long before the adoption of the National Labor Relations Act, this Court had many times held that the power of Congress to Regulate interstate commerce extends to the regulation through legislature action of activities intrastate which have a *substantial* effect on the commerce * * *" (Italics ours.)

It is clear that the Court did not intend to hold in the *Darby* case that any effect on interstate commerce,

no matter how indirect, would lend itself to regulation by Congress. The Court speaks of "substantial effects". The words "affecting interstate commerce," without the qualifying words "substantial" and "direct", are misconceptions that imply a notion not found in the cases. It would be difficult to find any activity today which does not in some remote way touch interstate commerce. Certainly there is a limit to the elasticity of the commerce clause of the Constitution.

Appellee expresses great concern over the protection of the consuming public and seems to assume that the Federal government is the only agency which can possibly render such protection. The state and its protective agency is ignored. The State of California has an act entitled The California Pure Drugs Act, Chapter 730, Statutes 1939, as amended in 1941 and 1943, and a staff for the enforcement of this act. This legislation is solely for the protection of the consuming public in the State of California, and its agents are ever watchful for violations. This dispels the insinuation that unless Section 331 (k) of the Federal Food, Drug and Cosmetic Act is applied or contended, the consuming public is without protection from this type of violation.

The Appellee's argument has a basic fallacy. The line of reasoning seems to be that because Congress passes legislation which it believes beneficial and necessary, the Court has no other problem before it. That is not the system of checks and balances set up in our Constitution.

As the Court said in *Schechter Poultry Corp. v. United States,* 295 U. S. 495:

> "It is not the province of the Court to consider the economic advantages or disadvantages of * * * a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the Federal Government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences and conspiracies to restrain and monopolize it. But the authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself established, between commerce 'among the several States' and the internal concerns of a State."

These pronouncements illustrate that the Courts are very conscious of the distinction between intrastate and interstate commerce and that intrastate activities can be regulated by Congress only when they directly and substantially affect interstate commerce.

It is difficult to see how the acts of this appellant directly or substantially affect interstate commerce at all.

IV.

CASES RELIED ON BY APPELLEE ARE NOT IN POINT.

Appellee relies on such cases as *United States v. Wrightwood Dairy Co.,* 315 U. S. 110, which arose

under the Agricultural Marketing Agreement Act of 1937, regulating the price of intrastate milk in competition with milk shipped in interstate commerce. The Court there found that there was interference with interstate commerce. The Court held that the intrastate activities substantially interfered with the exercise of the power to control interstate commerce granted Congress. The *Wrightwood* case involved the competition of a local product with that of a like commodity moving in interstate commerce. In the case at issue, appellant's acts and the commodities he sells do not compete with products moving in interstate commerce. They have no effect on interstate commerce whatever. A situation similar to the *Wrightwood* case arises in the case of *U. S. v. Rock Royal Cooperative, Inc.,* 307 U. S. 533, 83 L. ed. 1446, 59 S. Ct. 993, also cited in the appellee's brief. This case concerned milk dealers who handled milk moving in interstate commerce, which on its facts is a very different situation from that which we have here.

In such cases as *N. L. R. B. v. Fainblatt,* 306 U. S. 601; *N. L. R. B. v. Levour,* 115 F. (2d) 105 (C. C. A. 1); *N. L. R. B. v. Abell,* 97 F. (2d) 951 (C. C. A. 4), which are all cited by appellee, we have cases which involve the National Labor Relations Act and, manufacturers which, to a greater or lesser extent, were all manufacturing products which were shipped in interstate commerce, and situations in which a labor dispute would affect interstate commerce. Appellant is not a producer. He does not sell in interstate com-

merce. His acts cannot be compared to a strike in a manufacturing plant which supplies the entire nation with a certain product. The effect on interstate commerce in such a situation is obvious.

In the case of *McDermott v. Wisconsin,* 228 U. S. 115, upon which appellee relies quite heavily, we have a case arising under the 1906 Federal Food and Drugs Act. McDermott was the original consignee of the articles in that case, he having received them in interstate commerce, and not having sold them. The act specified control over goods "unloaded, unsold or in the original package". Appellee now wants us to go further. Appellant is not the original consignee, he is not selling in the original package. He purchased from an original consignee who had broken the original package and who sold many other and diverse items produced both within and without the state. The cases are distinguishable.

Appellee dismisses the case of *United States v. Phelps Dodge Mercantile Co.,* 157 F. (2d) 453 (C.C.A. 9, 1947) as one which needs little discussion. It is a case in point insofar as it is a pronouncement of the Court on the Federal Food, Drug, and Cosmetic Act and on a question of interstate commerce. The libel section of the Act, Section 304 (a), 21 U. S. C. A., Section 334 (a), provides that any adulterated or misbranded food, drug, device or cosmetic, may be proceeded against "while in interstate commerce, *or at any time thereafter*". The Court held that since the interstate journey of the food in question had

ended, the Federal Government had no jurisdiction to proceed with a libel action.

The Court said "Thus it appeared that the adulteration of the food occurred after it ended its interstate journey and came to rest at appellee's warehouse". The Court then cites such cases as *American Steel & Wire Co. v. Speed,* 192 U. S. 500; *Sonneborn v. Cureton,* 262 U. S. 506; *Louis K. Liggett Co. v. Lee,* 288 U. S. 517; *Walling v. Jackson Paper Co.,* 317 U. S. 564, all cases in which the Court has laid down the line of demarcation between interstate commerce and intrastate commerce, between Federal and State power. The fact that the section of the act contained the words "or at any time thereafter" did not alter this basic distinction. Similarly, the fact that the section involved in the case at issue, section 331 (k), contains the words "while held for sale after shipment in interstate commerce" does not increase the power of the Federal Government over articles whose interstate journey has ended, and whose sale can in no way, directly or substantially, affect interstate commerce.

The *Phelps Dodge* case is also of interest in that it demonstrates that the Court does not follow administrative interpretations of an act when those interpretations are erroneous.

The appellee mentions the case of *United States v. Sullivan,* 67 F. Supp. 192, decided in the United States District Court for the Middle District of Georgia, now pending on appeal before the Circuit Court of Appeals for the Fifth Circuit. This case is, of course,

similar to the case at issue, and in the opinion of the appellant reaches the same erroneous conclusion as to the power of the Federal Government.

In the recent case of *United States of America v. William Ray Olsen,* No. 11,407, decided May 15, 1947, in the United States Circuit Court of Appeals for the Ninth Circuit, this Court reversed a decree of the District Court of the United States for the District of Oregon. This case, like the *Phelps-Dodge* case, involved Section 304 of the Federal Food, Drug and Cosmetic Act. The Court said:

> "* * * When the article was introduced into, and while in interstate commerce, its labeling was false and misleading. Hence the article was misbranded within the meaning of the act, when introduced into and while in interstate commerce."

This is a situation different from the case at issue. In the *Olsen* case (supra), the government is proceeding against an item which violated the act when introduced into and while in interstate commerce. This is in accord with the *Phelps-Dodge* decision. In the case at issue, the government is attempting to reach intrastate acts merely because at one time interstate commerce was involved and despite the fact that there were no violations whatsoever during that period. Intrastate acts may be regulated if they directly or substantially affect interstate commerce. It is submitted that no such direct or substantial effect is present in this case. Any declaration in the act itself, which attempts to so extend the jurisdiction of the

Federal Government, is valid only if such direct and substantial effects are present.

CONCLUSION.

The appellant respectfully submits that since the acts of appellant were acts conceded to be in intrastate commerce, since the Federal Food, Drug and Cosmetic Act makes no attempt to cover acts affecting interstate commerce, and, in view of the fact that in any event it is utterly impossible to see how the appellant's acts could in any way, directly or substantially, affect interstate commerce, the judgment of the District Court should be reversed.

Dated, San Francisco, California,
May 29, 1947.

J. A. PARDINI,
ELDA GRANELLI,
F. CAMPAGNOLI,
Attorneys for Appellant.

(NOTE): Since the writing of this brief, the United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court of the United States for the Middle District of Georgia in the case of *Sullivan v. United States of America,* No. 11,774, decided May 12, 1947. The appellee relied on the District Court decision in its brief (Appellee's

Brief, p. 19). To date it is the only pronouncement of a Circuit Court on this point. The appellant submits that the facts of the case at issue and the *Sullivan* case are the same, and respectfully urges a similar decision by this Court.

For the convenience of the Court, the decision in the *Sullivan* case is printed *in toto* as an appendix to this brief.

(Appendix Follows.)

Appendix.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11,774

JORDAN JAMES SULLIVAN, TRADING AS SULLIVAN'S PHARMACY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for Middle District of Georgia.

(May 12, 1947.)

Before SIBLEY, McCORD, and LEE, Circuit Judges.

SIBLEY, Circuit Judge: Sullivan, a local retail merchant in Columbus, Georgia, was convicted under the Federal Food, Drug and Cosmetics Act, 52 Stats. 1040, Sect. 301, (c) and (k), 21 U.S.C.A. §331(c) and (k), for selling to two federal inspectors two lots of twelve tablets each of sulfathiazole taken from a bottle on the shelves of his drug store which had con-

tained 1,000 tablets. The facts as alleged in the information and stipulated or proven on the trial are these: Between Nov. 25, 1943, and March 15, 1944, Abbott Laboratories, doing business in North Chicago, Illinois, shipped in interstate commerce to Abbott Laboratories, at Atlanta, Georgia, a number of boxes containing bottles of drugs, one of them being this bottle of 1,000 tablets of sulfathiazole, which was duly labeled as such, with a caution that they are to be used only by or on the prescription of a physician, and with the name and Chicago address of Abbott Laboratories. This bottle so labeled was on Sept. 29, 1944, in Atlanta sold to Sullivan, and by him transferred in intrastate commerce to his pharmacy in Columbus, and placed on his shelves for retail sales to customers. On Dec. 13, 1944, the two lots of twelve tablets each were taken from the bottle, placed in pasteboard pill boxes, with only the word sulfathiazole (slightly misspelled) on them, and sold to the federal inspectors. The label on the bottle was not defaced or changed, and the bottle was seen and afterwards taken in charge by the inspectors. A motion to dismiss the information as not charging a federal crime, and one for a judgment of acquittal because none was proved, were overruled and this appeal taken.

The general constitutionality of the federal act under the commerce clause of the Constitution is admitted. The contentions are that the Act is not intended to operate on retail sales over the counter after interstate commerce has ended, by one who was not the importer; that the language is not clear enough to

make criminals of such sellers; and that if construed to apply to them the Act is to that extent beyond the power of Congress.

It will be noted that the only interstate commerce here involved is the transportation of bottles of drugs in boxes from Chicago to Atlanta at least nine months before the sales here in question. The boxes came to rest in Atlanta and were opened by the importer, Abbott Laboratories, and the bottles were put in their stock of drugs in Atlanta for sale. Over six months thereafter Sullivan bought one bottle, which is conceded to have been duly labeled, and put it into his stock of drugs at Columbus for retail sales, where the bottle stayed for three more months. If the criminal provisions relied on apply here, they apply to all intrastate sales of imported drugs after any number of intermediate sales within the State and after any lapse of time; and not only to such sales of drugs, but also to similar retail sales of foods, devices and cosmetics, for all these are equally covered by these provisions of the Act. We are not able to conclude that the Act is to be so construed as to bring within these penal provisions most of the sales in all drug stores, beauty parlors, barber shops and retail grocery stores in the United States.

The general purpose of the Act is declared in its simple title: "An Act to prohibit the movement in interstate commerce of adulterated and misbranded foods, drugs, devices and cosmetics, and for other purposes." Section 301(c) prohibits (under penalty by Section 303), "The receipt in interstate commerce of

any food, drug, device or cosmetic that is adulterated or misbranded, and the proffered delivery thereof for pay or otherwise". Sullivan clearly did not receive in interstate commerce any misbranded drug, nor did he proffer delivery of any in interstate commerce. A moderately strict construction of this penal provision would confine it to shippers and to importers in interstate commerce, and proffers of sale by the latter. Sullivan was a party to intrastate sales only. Moreover since this bottle was at all times duly labeled and not misbranded, no one violated this provision by receiving or proffering delivery of it.

Section 301(k) prohibits "The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other Act with respect to, a food, drug, device or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded." The labeling here was not removed or mutilated; but an act was done with respect to the drug, to-wit, the removal of some of it from the labeled bottle and the placing of it in a box not sufficiently labeled under the Act, after shipment in interstate commerce and while the drug was held for sale, so that this portion of the drug became misbranded. Therefore in their broadest possible sense these words may include what happened. But we are of opinion that they ought not to be taken so broadly, but held to apply only to the holding for the first sale by the importer after interstate shipment. Since importa-

tion by merchants of all merchandise is for the very purpose of sale, the importation, as has always been held, remains incomplete till its purpose is thus realized. *Brown v. Maryland,* 12 Wheat. 419. The words of Section (k), "held for sale after shipment in interstate commerce", naturally refer to this first sale by the merchant importer. It was this sale which was involved in *McDermott v. Wisconsin,* 228 U. S. 115, and in *Baldwin v. Seelig,* 294 U. S. 511, much relied on by the government. We do not doubt, however, that the United States can prohibit the destruction of the labeling under which interstate commerce occurred, by anyone at any time, in order to preserve the evidence of what was done during the interstate movement, as is fairly held in the *McDermott* case cited; but here this evidence was never meddled with, but went unaltered into the hands of the inspectors, and it shows a correct labeling. These main provisions of subsection (k) were fully complied with. The attempt here made is to extend subsection (k) so as to make criminal all retail sales from the interstate package, though made clearly in intrastate commerce, unless the label on the interstate package which has been broken be reproduced on the retail package. We believe no grocer or druggist thus breaking an interstate package for a retail sale has understood this was necessary, and it is said this case is the first effort to apply the federal Act in this way. If the "holding for sale" is held to refer to all would-be sellers, no matter where or when or in what quantities, of all foods and drugs and cosmetics which at

some time had moved in interstate commerce, the field of enforcement of the Act will be multiplied many times. The reason urged for so expanding it, to-wit, the protection of ultimate consumers, only makes another difficulty; for while Congress may regulate interstate commerce to any extent and almost for any purpose it thinks proper, this extended application would be really a direct regulation for police purposes of what is plainly intrastate commerce, which is the peculiar province of the State.

And the State of Georgia has not neglected her duty. Title 42 of the Georgia Code deals with the subject of selling and labeling foods, drugs and toilet articles, with several cooperative references to the federal laws and regulations, as in Sect. 42-110, 42-111; and 42-802, 42-806. Sections 42-701 and ff. regulate the dispensing of poisons, this legislation dating back to the year 1876. Sections 42-101 and ff. embody comprehensive laws on the subject of foods and drugs passed in 1906 and 1908. The Uniform Narcotic Drugs Act of 1935 is found in Sections 42-801 and ff. The Dangerous Drug Act of 1939 is in Sections 42-708 and ff. The last expressly covers the derivatives and compounds of sulfanilimide, and the label on the bottle here in controversy indicates that sulfathiazole is such, so that this Georgia Act applies to these sales, and Sullivan appears to have violated it here. It would seem the federal inspectors should have reported them to the Georgia inspectors. It is probable that other States have similar laws, reducing the need for Congress to interfere thus in intrastate commerce, if it has the power.

In passing this Act Congress in its title indicated that its main and direct concern was with "the movement in interstate commerce". Until that movement is complete and the importer has sold his original packages the State cannot interfere. Congress regulated what the Constitution directly authorizes. There is no indication of any intention to regulate intrastate commerce because of any burdensome effect on interstate commerce. The talismanic expression "Affecting interstate commerce" is not used, as in the National Labor Relations Act passed shortly before. In interpreting and applying those words in *National Labor Relations Board v. Jones and Laughlin Steel Corp.,* 301 U. S. 1, the Court was careful to point out the rule of construction of statutes that a construction will not be adopted that is of doubtful constitutionality, in this very matter of federal intrustion upon the domain of the States, saying at page 30: "We have repeatedly held that as between two possible constructions of a statute by one of which it would be unconstitutional and the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same (citing numerous cases.)"[1] Also in *Federal Trade Commission v. Bunte Bros.,* 312 U. S. 349, we read: "The construction of Sect. 5 urged by the Commission would give the federal agency control over myriads of local businesses in matters heretofore traditionally left to custom or local law. . . . An inroad upon local conditions and local standards of such

[1]*Schechter Poultry Corporation v. United States*, 295 U. S. 495, though not exactly in point, is enough to raise serious doubt in this case.

farreaching import as involved here ought to await a clearer mandate from Congress." Much more ought unambiguous and clear words to be required when statutes creating criminal offenses are for construction. *United States v. Wiltberger,* 5 Wheat. 76; *United States v. Harris,* 177 U. S. 305; *Kraus v. United States,* 327 U. S. 614.

The purpose of this Act being to regulate "movement in interstate commerce" of foods, drugs and cosmetics, and the general purpose of subsection (k) being to prohibit mutilation of the labeling on the packages which so moved, we do not find the proposed application of the *ejusdem generis* words "Any other act" plain enough to make criminals of retail grocers and druggists who did not import but who break and sell intrastate from the imported packages without mutilating the labeling.[2] We thus find it unnecessary to determine the constitutionality of the federal regulation of intrastate sales as here contended for, by denying that doubtful construction.

The judgment is reversed with direction to acquit the defendant below.

JUDGMENT REVERSED.

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[2] *Armour and Co. v. Dakota,* 240 U. S. 510, and *Weigle v. Curtice Bros. Co.,* 248 U. S. 285, held that retail sales from broken interstate packages were not governed by the federal Food and Drugs Act then in force but by the State law, partly for constitutional reasons; but the present Act differs enough to make these decisions probably not controlling here. In *United States v. Dotterweich,* 320 U. S. 277, the shipment of the repacked drugs was in interstate commerce and was prosecuted under Sect. 301(a), and the construction of (k) was not involved at all.